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Leong Yeu Moi (F) v Neo Ai Si (F)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(W)-539–03 OF 2017
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND MOHAMAD ZABIDIN JJCA
17 SEPTEMBER 2019

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Civil Procedure — Action — Limitation period — Action against estate of deceased — When did limitation begin — Sarawak Limitation Ordinance s 17(2)

D

Evidence — Appeal — Finding of fact — Whether trial judge had unjustly brushed aside evidence of witnesses — Whether trial judge committed an appealable error which warranted appellate intervention

E

Evidence — Expert evidence — Signature — Signature of deceased — Whether court correct to allow objection based on a wife who would know her husband's signature

F

Evidence — Proof of evidence — Onus of proof — Facts within special knowledge of defendant — Whether duty of plaintiff to prove purpose of loan

This was an appeal by the appellant against the decision of the High Court in Miri which dismissed the plaintiff's claim against the respondent as the administratix of the estate of the deceased. The defendant was the wife of and the administratrix of deceased who had passed away intestate and the defendant was granted letters of administration by the Miri District office. Before his demise the deceased had taken a total of 68 friendly loans totalling to RM1,935,500, which it was not disputed that he did not make any payment of any of the 68 loans during his lifetime, and in return during his lifetime the deceased had issued 68 cheques to the plaintiff as collateral and/or security for the repayment of the loans taken from the plaintiff. The plaintiff averred that the deceased had represented in a letter dated 15 July 2010 in the event he was unable to pay any or all of his debts, he agreed to irrevocably and unconditionally assign and transfer his landed properties and vehicles to the plaintiff. The defendant in her defence: (a) denied that the plaintiff had ever loaned the sum or any amount whatsoever to the deceased, even if given, the defendant alleged that the loans were illegal moneylending transactions in contravention of the Moneylenders Act 1951; (b) a substantial part of the sums

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loaned consisted of interest; (c) there was no agreement in writing executed between the plaintiff and deceased to evidence the loans; and (d) during the lifetime of the deceased he had purchased a personal accident policy for the sum of RM600,000 which had been assigned to the plaintiff as security for any payment due from the deceased to the plaintiff. It was agreed that in the event the deceased passed away, the insured sum shall constitute a full and final settlement towards any outstanding balance owing to the plaintiff. The sum of RM600,000 was paid to the plaintiff after the deceased passed away and the defendant's contention was that the plaintiff was therefore estopped from claiming the RM1,935,500. The plaintiff raised the following grounds in this appeal: (i) learned trial judge erred when he held that the plaintiff's claim against the defendant was time-barred; (ii) the learned trial judge erred when he held that the plaintiff had failed to prove that she had the financial capacity to give out the loans on balance of probabilities; (iii) the learned trial judged erred when he found that the 68 cheques were not issued as collateral for the loans; (iv) the learned trial judge erred when he found that the deceased did no require the loans to run his business; and (v) the learned trial judge erred when he held that the plaintiff's witness, PW2 had failed to tender any proof of her late husband's income.

Held, allowing the appeal and setting aside the judgement of the High Court with costs of RM30,000:

(1) The trial judge failed to realise that limitation could only set in against the plaintiff's claim within three years after the defendant had extracted her letters of administration in respect to the deceased's estate pursuant to s 17(2) of the Sarawak Limitation Ordinance. Since the letters of administration was extracted by the defendant as administratrix of the deceased's estate on 24 November 2010 and the plaintiff filed the present suit on 19 July 2013, the plaintiff's claim was well within the three-year limitation period. Therefore, the plaintiff's claim was not statute-barred (see paras 30–31).

(2) The evidence of PW1 and PW2 were credible and supported the plaintiff's claim which was erroneously and unjustly brushed aside by the learned trial judge. PW1's and PW2's evidence pertaining to the plaintiff's capacity to give out the loan such as the plaintiff's landed properties, her savings in her various bank accounts, the millions of ringgit which she inherited from her late husband after he passed away and the amount of RM600,000 given by PW1 to the deceased all go to show that the learned trial judge had committed an appealable error which warranted appellate intervention on his findings of fact. The court was mindful of the trite law that findings of fact and issues pertaining to the credibility of witnesses were within the scope of the trial judge, but

when the finding was so perverse and against the weight of evidence as in the instant appeal, appellate intervention was warranted to prevent injustice (see para 35).

(3) The learned trial judge had erred when accepted the defendant's objection on the two letters marked as P1A–B and P3 on the ground that the defendant being the wife of the deceased who would be in a position to know her late husband's signature, in the absence of expert opinion by a handwriting expert (see para 36).

(4) The learned trial judge put the burden on the plaintiff (the giver) to adduce evidence that the plaintiff needed substantial amount of capital to run his company's business when those facts were within the special knowledge of the defendant and the deceased. In fact, it was not the duty of the plaintiff to prove the purpose of the loan (see para 43).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap keputusan Mahkamah Tinggi di Miri yang mengetepikan tuntutan plaintif terhadap responden sebagai pentadbir si mati yang telah meninggal dunia tak berwasiat dan defendan telah diberikan surat cara pentadbiran oleh Pejabat Daerah Miri. Sebelum kematiannya, si mati telah mengambil sejumlah 68 'friendly loan' berjumlah RM1,935,500, yang mana ianya tidak dinafikan bahawa dia tidak membuat apa-apa pembayaran kepada mana-mana 68 pinjaman semasa beliau masih hidup, dan sebaliknya sepanjang waktu beliau hidup, si mati telah mengeluarkan 68 cek kepada plaintif sebagai cagaran dan/atau jaminan untuk pembayaran semula pinjaman yang dibuat daripada plaintif. Plaintif mennyatakan bahawa simati telah menyatakan dalam satu surat bertarikh 15 Julai 2010 dalam keadaan beliau tidak dapat membayar sebahagian atau kesemua hutangnya, dia bersetuju untuk menyerahhak tanah dan kenderaannya kepada plaintif tanpa sebarang syarat dan ianya tidak boleh dibatalkan. Defendan dalam pembelaannya: (a) menafikan bahawa plaintif telah meminjamkan jumlah tersebut atau apa-apa jumlah kepada si mati, dan jikalau ianya diberikan, defendan menyatakan bahawa pinjaman tersebut adalah transaksi pinjaman wang yang haram bertentangan dengan Akta Peminjam Wang 1951; (b) sebahagian besar jumlah yang dipinjamkan merupakan faedah; (c) tiada perjanjian bertulis dilaksanakan antara plaintif dan si mati untuk membuktikan pinjaman; dan (d) sepanjang hayar si mati telah membeli polisi kemalangan peribadi untuk jumlah RM600,000 yang mana telah diserahhakkan kepada plaintif sebagai jaminan untuk apa-apa pembayaran yang terhutang dari si mati kepada plaintif. Ianya dipersetujui yang dalam keadaan si mati meninggal dunia, jumlah yang dijamin akan menjadi satu penyelesaian akhir dan penuh terhadap apa-apa baki yang terhutang kepada plaintif. Jumlah RM600,000 telah dibayar kepada plaintif selepas si mati meninggal dunia dan adalah hujahan defendan bahawa plaintif adalah dengan itu, diestop dari menuntut RM1,935,500. Plaintif membangkitkan alasan

berikut dalam rayuan ini: (i) hakim bicara terpelajar terkhilaf apabila memutuskan bahawa tuntutan plaintif terhadap defendan dihalang oleh had masa; (ii) hakim bicara terpelajar terkhilaf apabila dia memutuskan bahawa plaintif gagal untuk membuktikan bahawa dia mempunyai kebolehan kewangan untuk memberikan pinjaman tersebut atas imbangan kebarangkalian; (iii) hakim terpelajar terkhilaf apabila dia mendapati bahawa 68 cek tersebut tidak dikeluarkan sebagai kolateral kepada pinjaman tersebut; (iv) hakim terpelajar terkhilaf apabila dia mendapati si mati tidak memerlukan pinjaman tersebut untuk menjalankan perniagaannya; dan (v) hakim terpelajar terkhilaf apabila memutuskan bahawa saksi plaintif, SP2 gagal untuk mengemukakan apa-apa keterangan berkenaan pendapat arwah suaminya.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos RM30,000:

(1) Hakim bicara gagal untuk sedar bahawa had masa hanya boleh bermula terhadap tuntutan plaintif dalam tempoh tiga tahun selepas defendan mengekstrak surat cara pentadbiran oleh defendan sebagai pentadbir estet si mati pada 24 November 2010 dan plaintif telah memfailkan tindakan ini pada 19 Julai 2013, tuntutan plaintif adalah dalam tempoh had masa tiga tahun. Oleh itu tuntutan plaintif tidak dihalang oleh had masa (lihat perenggan 30–31).

(2) Keterangan PW1 dan PW2 adalah kredibel dan menyokong tuntutan plaintif yang telah secara salah diketepikan oleh hakim bicara terpelajar. Keterangan PW1 dan PW2 berkaitan dengan keberupayaan plaintif untuk memberikan pinjaman tersebut dan hartanah plaintif, simpanannya dalam beberapa akaun bank, jutaan ringgit yang diwarisi beliau oleh dari suaminya yang telah menginggal dunia dan jumlah RM600,000 yang diberikan oleh PW1 kepada si mati semua menunjukan bahawa hakim bicara telah membuat kekhilafan yang boleh dirayu yang memerlukan campur tangan rayuan atas dapatan fakta ini. Mahkamah juga sedar bahawa adalah menjadi undang-undang mantap bahawa dapatan fakta dan isu berkaitan dengan kredibiliti saksi adalah dalam skop hakim bicara, akan tetapi, apabila dapatan tersebut adalah songsang dan bertentangan dengan keterangan sepertimana dalam rayuan ini, capur tangan rayuan adalah diperlukan untuk mengelakkan ketidakadilan (lihat perenggan 35).

(3) Hakim terpelajar terkhilaf apabila menerima bantahan defendan berkenaan dengan dua surat yang ditandakan sebagai P1A–B dan P3 atas alasan defendan yang merupakan isteri si mati akan berada dalam kedudukan untuk mengetahui tandatangan arwah suaminya, dalam ketiadaan pendapat pakar atau pakar tulisan tangan (lihat perenggan 36).

(4) Hakim bicara terpelajar meletakkan beban pada plaintif (pemberi) untuk mengemukakan keterangan bahawa plaintif memerlukan modal yang

banyak untuk menjalankan perniagaan syarikatnya apabila fakta tersebut merupakan dalam pengetahuan khas defendan dan si mati. Ianya bukan beban plaintif untuk membuktikan tujuan pinjaman (lihat perenggan 43).]

Notes

For cases on limitation period, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 220–229.
For cases on finding of fact, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 651–652.
For cases on onus of proof, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2927–2937.
For cases on signature, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2045–2047.

Cases referred to

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 2 CLJ 871, SC (refd)
Leong Yew Chin v Hock Hua Bank Bhd [2008] 3 MLJ 340; [2008] 1 LNS 94, HC (refd)

Legislation referred to

Civil Law Act 1956 s 8(1)
Moneylenders Act 1951
Sarawak Limitation Ordinance (Cap 49) s 17(2), Schedule, items 38, 39, 53, 54

Appeal from: Suit No MYY-22–17/7 of 2013 (High Court, Miri)

Rajesh Jethi (Jethi & Assoc) for the appellant.
Merlyn Toh Ai Mei (Merlyn Toh & Co) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/plaintiff against the decision of the High Court at Miri, given on 3 March 2017 after a full trial, in dismissing the appellant/plaintiff's claim against the respondent/defendant, as the administratrix of the estate of the late Mr Wong Tiong Hua ('the deceased').

[2] We heard the appeal on the 25 June 2019, wherein at the end of it, after considering the submissions of parties, both oral and written, we unanimously allowed the appeal with costs. We now give our reasons for so doing.

A **[3]** For ease of reference, the parties will be referred to as they were in the High Court action.

BRIEF BACKGROUND FACTS

B **[4]** The defendant was the wife of and the administratrix of her late husband, the deceased, who had passed away on 8 August 2010. The deceased had passed away intestate and the defendant was granted letters of administration by the Miri District Office on 24 November 2010 in respect of the deceased's estate.

C **[5]** Between the year 2009–2010 and before his demise, the deceased had taken a total of 68 friendly loans totalling RM1,935,500 from the plaintiff. In return, during his lifetime, the deceased had issued 68 cheques to the plaintiff as collateral and/or security for the repayment of the loans taken from the **D** plaintiff.

[6] The plaintiff averred that the deceased had represented in a letter dated 15 July 2010 that in the event that he was unable to pay any or all of his debts, he agreed to irrevocably and unconditionally assign and transfer his landed **E** properties and vehicles to the plaintiff.

[7] It was not disputed that the deceased did not make any payment of any of the 68 loans during his lifetime.

F **[8]** The defendant in her defence denied that the plaintiff had ever loaned the sum of RM1,935,500 or any amount whatsoever to her late husband. Even if given, the defendant alleged that the loans were illegal moneylending transactions, in contravention of the Moneylenders Act 1951. The defendant **G** further alleged that a substantial part of the sums loaned consisted of interest.

[9] The defendant also pleaded that there was no agreement in writing executed between the plaintiff and the deceased to evidence the loans.

H **[10]** The defendant further pleaded that during the deceased's lifetime, he had purchased a personal accident policy with AXA Affin General Insurance for the sum of RM600,000 which had been assigned to the plaintiff as security for any payment due from the deceased to the plaintiff.

I **[11]** It was agreed that in the event the deceased passed away, the insured sum shall constitute a full and final settlement towards any outstanding balance owing to the plaintiff. The sum of RM600,000 was paid to the plaintiff after the deceased passed away and the defendant's contention was that the plaintiff is therefore estopped from claiming the RM1,935,500.

[12] Wherefore, the plaintiff claimed against the defendant for the sum of RM1,935,500 and/or alternatively, for a transfer from the deceased's name and/or the defendant's name onto the plaintiff's name all of the deceased's properties and vehicles mentioned as collateral under his letter to the plaintiff dated 15 July 2010 to satisfy so much of the sum of RM1,935,500 owing to the plaintiff plus interest and costs of the action.

At the High Court

[13] After a full trial, the learned trial judge found that the plaintiff had failed on a balance of probability to prove her claim against the defendant. The learned trial judge identified the following three issues for the court's determination:

(a) whether the plaintiff had given the deceased the loan sum of RM1,935,500;

(b) whether the plaintiff's suit against the deceased's estate is time-barred; and

(c) whether the loans given were illegal moneylending transactions contrary to the Moneylenders Act 1951.

[14] As to the first issue, the learned trial judge after considering the plaintiff's pleaded case and the evidence adduced before him, held that the plaintiff had failed to prove her capacity to give the said loan to the deceased on a balance of probability. The learned trial judge's reason was based on the failure by the plaintiff to produce the passbooks and bank statements for the court to look at. Therefore, learned trial judge held that the plaintiff did not have the said sum in her bank account to be given as a loan to the deceased.

[15] The learned trial judge further held that there is no evidence to support the plaintiff's contention that she worked as a cook for 12 years with a monthly income of RM3,000 per month and earned an accumulated monthly rental of RM1,200 per month for her three houses in Krokop, Miri and that her husband earning RM10,000 per month as a supervisor in a timber camp. The learned trial judge also did not believe the plaintiff's contention that she had inherited a substantial amount of cash from her late husband as well as two units of houses in Selangor.

[16] The learned trial judge also held that the plaintiff's daughter, Chong Lai Kit ('PW1') who was the deceased's close friend and acquaintance's allegation that she had given the amount of RM600,000 to the deceased was without any supporting evidence. The learned trial judge held that PW1 too could not be expected to give money to the plaintiff to loan the deceased as she did not have the financial ability, being an undischarged bankrupt with a debt

of more than a million. PW1's husband as well was also an undischarged bankrupt.

[17] The learned trial judge further held that there was no evidence led by the plaintiff that the deceased's companies would need a substantial amount of capital, hence the need to borrow from the plaintiff and PW1. The deceased was gainfully employed before his passing. The deceased was involved in Mantap Niaga Sdn Bhd and Ho Yee Kee Restaurant businesses which entities were only established just before the death of the deceased. For the other two companies, KT Agency and Hand Enterprise, that had been established in 1998 and 2006 respectively only dealings in manpower and maid supply, the learned trial judge was of the view that would not require the deceased to borrow almost RM2.5m from the plaintiff and PW1.

[18] As for the 68 cheques issued by the deceased, the learned trial judge held that based on the writings at the back of the cheques, those 68 cheques were not collateral security for the alleged loans of RM1,935,500.

[19] On the second issue in respect of time bar, the learned trial judge was of the view that under item 38 of the Schedule to the Sarawak Limitation Ordinance, the time period of three years began to run from the date when the loan was made and not from the date of the extraction of the letter of administration by the defendant. As the plaintiff had the right to institute the action against the deceased during his lifetime and the plaintiff was not required to wait until the death of the deceased to do so, hence all the 36 cheques which amounted to RM1,395,500 are all statute-barred.

[20] On the last issue as to whether the loans given were illegal moneylending transactions contrary to the Moneylenders Act 1951, the learned trial judge was of the view that the defendant had abandoned her defence on this issue as the defendant had not submitted on this issue before the learned trial judge.

[21] The learned trial judge found at the end of the trial that the plaintiff had failed to prove her claim on a balance of probabilities. Hence, the plaintiff's claim was dismissed with costs of RM20,000 to the defendant subject to payment of the allocator fees. Hence, the appeal before us.

The appeal

[22] The plaintiff raised the following five main grounds in this appeal, namely:

(a) learned trial judge erred when he held that the plaintiff's claim against the defendant was time-barred;

(b) learned trial judge erred when he held that the plaintiff had failed to prove that she had the financial capacity to give out the loans on balance of probabilities;

(c) learned trial judge erred when he found that the 68 cheques were not issued as collateral for the loans;

(d) learned trial judge erred when he found that the deceased did not require the loans to run his businesses; and

(e) learned trial judge erred when he held that the plaintiff's witness, PW2 had failed to tender any proof of her late husband's income.

Time-barred

[23] On the issue of limitation, learned counsel for the defendant submitted that the relevant limitation provision on the loan is governed by items 38 and 39 of the Schedule to the Sarawak Limitation Ordinance which provides a limitation period of three years from the date when the loan was made or when the cheque is paid. Based on the dates, learned counsel argued that a total of 36 cheques out of 68, which were dated between 24 March 2009–16 July 2010 amounting to RM1,395,500 were already statute-barred when the plaintiff filed the suit on 19 July 2013.

[24] Learned counsel for the defendant further submitted that the said 36 cheques were also statute-barred by virtue of item 53 of the Sarawak Limitation Ordinance which provides that a limitation period of three years from the date of the cheque to institute the action against the deceased. It was argued that the plaintiff's right to sue on the 36 cheques had been extinguished.

[25] It was further contended that 12 out of the 68 cheques were dated after the death of the deceased on 8 August 2010 in the total sum of RM460,500, and that there was no explanation from the plaintiff on this.

[26] Lastly, on the question of limitation, learned counsel for the defendant relied on item 54 of the Schedule to the Sarawak Limitation Ordinance which provides a limitation period of three years from the date of the cheque to institute an action. Based on item 54, there were 36 cheques that were statute-barred. All these cheques were dated before the death of the deceased on 8 August 2010. The plaintiff's right had therefore been extinguished on these 36 cheques at the time when she filed her writ of summons on 19 July 2013.

[27] Learned counsel for the defendant cited the case of *Leong Yew Chin v*

Hock Hua Bank Bhd [2008] 3 MLJ 340; [2008] 1 LNS 94, judgment of Abdul Malik Ishak J (as he then was) citing the decision of Hashim Yeop A Sani CJ (Malaya) in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871:

> On the question of limitation, His Lordship Hashim Yeop A Sani CJ (Malaya) (as he then was) reminded us of its importance in this way (see pp 4123–414 of the report):
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> > The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
> >
> > The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest reipublicae ut sit finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[28] The plaintiff on the contrary relied on s 17(2) of the Sarawak Limitation Ordinance where it was stipulated that a period of limitation shall only commenced to run from the date the letters of administration was extracted by the defendant. Section 17(2) states:

> When a person against whom, if he were living, a right to institute a suit would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the Plaintiff may institute such suit.

[29] On the issue of limitation, the learned trial judge ruled as follows:

> [46] On this issue and having read both the plaintiff and the defendant submissions, I prefer the defendant's discussion, because the 36 listed cheques were all dated by the deceased as evidence that he had received those loans and which the deceased would settle or be able to settle on the dates he wrote on the cheques. Thus the plaintiff would have to commence suit against the deceased within three years from the dates of the respective cheques. Take for example cheque No 36, No 194122 (exh P2(36)) for RM40,000, it was dated the 16 July 2010 which limitation period is three years. This means that the three years would expire on the 17 July 2013 and such action by the plaintiff against the defendant after the 17 July 2013 would be statue-barred since the plaintiff only commenced this suit on the 19 July 2013. It is my view the 36 cheques which amounted to RM1,935,500 are all statute-barred.

[30] We agreed with the plaintiff's contention that the above finding of the learned trial judge was flawed in many respect. First, whilst the learned trial judge held that the 36 cheques were time-barred under item 39 and/or item 54 of the Sarawak Limitation Ordinance and that therefore the entire sum of

RM1,935,500 was time-barred, the 36 cheques would not amount to the said sum. Secondly, the learned trial judge failed to consider and realise that limitation would have only set in against the plaintiff's claim within three years after the defendant had extracted her letters of administration in respect of the deceased's estate pursuant to s 17(2) of the Sarawak Limitation Ordinance. The law against the estate claims are governed by s 8(1) of the Civil Law Act 1956, which states:

> Subject to this section, on death of any person, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:
>
> > Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

[31] We further agreed with the plaintiff that the learned trial judge had misapprehended the fact and had further misdirected himself on the relevant law in arriving at his conclusion when His Lordship faulted the plaintiff for not instituting any claim during the deceased's lifetime and for not bank in the cheques. The learned trial judge ignored the clear and uncontroverted evidence that the 68 cheques were not meant to be banked in but only as security for the said friendly loans. Some of the cheques were even post-dated and there was no fixed repayment period for the loans given by the plaintiff. It is our finding that since the letters of administration was extracted by the defendant as administratrix of the deceased's estate on 24 November 2010 and the plaintiff filed the present suit on 19 July 2013, the plaintiff's claim was well within the three year limitation period. Therefore, the plaintiff's claim was not statute-barred.

The plaintiff's capacity to give out loans to the deceased

[32] The defendant in her amended defence at para 4(c) pleaded that the plaintiff did not have the financial means to lend out a total sum of RM1,935,500 to the deceased over the short period of less than two years. After hearing and considering the evidence from the plaintiff (PW2) and the plaintiffs' witness, Chong Lai Kit (PW1), the learned trial judge ruled that the plaintiff did not have the said sum in her bank account to be given as loans to the deceased. The learned trial judge further held that there was no evidence that the plaintiff was cash rich so as to be able to give out the 68 loans amounting to RM1,935,500 to the deceased.

[33] The relevant findings made by the learned trial judge can be found at paras 19–24 of his grounds of judgment which we reproduce below in extensso:

A [19] According to PW1 and PW2 the said sum was withdrawn from the plaintiff's Maybank account. The defendant had cross-examined the plaintiff on whether she could produce her passbooks and bank statements from her bank accounts (p 107 NOP). To me such questions asked are consistent with the defence's stance as pleaded in para 4(c) of the amended defence: 'The Plaintiff did not have the B financial means to let out a total sum of RM1,935,500.00 to the Deceased over the short period of less than 2 years'. The plaintiff had also replied in para 3(c) of her amended reply: 'The Plaintiff did in fact have capacity to loan the total sum of RM1,935,500.00 and did in fact loan the same to the deceased'. The plaintiff in her amended reply had clearly asserted that she had the 'capacity to loan' but for her to C do so or that she had the capacity, the plaintiff has to prove 'her capacity' by producing the passbooks and bank statements for the court to look at. The plaintiff had not done so, bearing in mind the said sum is a huge sum and by not producing those bank statements, the plaintiff had not proven on her capacity to give the said loans to the deceased. Therefore, on a balance of probabilities the plaintiff did not have said sum in her bank account to be given as loans to the deceased.

D [20] In coming to such a finding, I find support from the case referred to by the defendant namely, *Konwa Industrial Sewing Machine (M) Sdn Bhd v Kang Thien Tze* [2015] MLJU 609; [2015] 1 LNS 950, where in para [23] the court held: 'First and foremost, there is no proof of payment of the sum of RM600,000 to D1. This evidence led of the payment through DW1 and DW2 is contradictory and in E conflict as well as insufficient to prove payment as alleged. It is plain that DW2 did not produce any evidence whatsoever, whether documentary or otherwise, for the loan of RM600,000 accordingly to the FLA. DW1 and DW2, under cross-examination contradicted each other on the alleged mode of payment to the first defendant of this substantial sum. Hence, their evidence on the vital issue of F payment can be considered unreliable and incredible. DW1 testified that the RM600,000 was withdrawn by DW2 in the form of cash and cheque in his presence when DW2 withdrew the money from Maybank whereas DW2 testified that he withdrew the money from CIMB Bank in Batu Road, KL. *More importantly DW2, without proffering any plausible explanation, failed to produce any evidence to prove the withdrawal of this huge sum of money from his bank account in cash, which would be* G *easily available in the form of bank statements, withdrawal slips or other relevant banking documents*. I concur with the plaintiff's submission unanswered these issues cast serious doubts on DW2's allegation that he had given a friendly loan to the first defendant in the said sum. In my finding, the evidence of DW1 and DW2 considered as a whole, totally lacked credibility and clearly failed to prove the fact H asserted that DW2 had made the payment of RM600,000 to the first defendant'. (Emphasis added.)

[21] Next it is also important to consider whether the plaintiff is cash rich so as to be able to give such loans amounting to RM1,935,500 to the deceased. As I have said this is a big sum indeed. The facts showed that the plaintiff was married and had I four children (p 97 NOP). She worked as a cook for 12 years with a monthly income of RM3,000 until she retired in 1993. Her gross income would be RM36,000 per year and for 12 years that would add up to RM432,000. After her retirement the plaintiff did not work and relied on her saving for her living (pp 96–98 of NOP). Learned counsel submitted the plaintiff could have been employed as a cook much longer or could have been employed elsewhere before she became a cook, as such her

savings could have been more than RM432,000. The plaintiff also submitted that she earned an accumulated monthly rental of RM1,200 for her three houses in Krokop, Miri (p 99 NOP).

[22] The plaintiff's evidence was that her late husband was a supervisor in a timber camp allegedly receiving monthly income of around RM10,000. She claimed to have inherited substantial amount of cash from her late husband as well as two units of houses in Selangor (p 102 of NOP). There is no doubt that RM10,000 per month was substantial salary for a supervisor. This would be RM120,000 per year and assuming her husband was employed for ten years that would be RM1.2m. The combined savings of both the plaintiff and her late husband would be RM1,632,000 which should be in the plaintiff's account when her husband passed away.

[23] But there is no evidence led by the plaintiff whether she was receiving RM3,000 as a cook and that she would have RM432,000 in her account when she retired or have accumulated RM1,935,500. There was also no proof that her husband who was a supervisor was paid RM10,000 per month and that at the time of her husband's death there was so much amount of money left by the husband for her. There was also no evidence that the plaintiff had three houses in Krokop and two units of houses in Selangor. These are evidence required to support the plaintiff's capacity to lend RM1,935,500 to the deceased. But there was no such evidence.

[24] As for PW1, she too could not be expected to give money to the plaintiff as she did not have the financial ability, she being an un-discharged bankrupt since 2002 with a debt of more than a million. Her ex-husband is also an undischarged bankrupt (pp 34–35 of NOP). Perhaps I should mention the insurance sum of RM600,000. PW1 claimed she gave loan to the deceased that was why she was made the beneficiary. Again there was no evidence on this loan. In any case this so called loan and her ability to lend to the deceased would not be consistent with her status as a bankrupt. I am of the view the so called loan of RM600,000 that PW1 allegedly gave the deceased without more is suspect. But there is evidence to show that PW1 was close to the deceased and they were acquaintances or shall I say they might even be intimate friends. Such situation would explain why PW1 was named beneficiary to the insurance taken by the deceased. The point I am making is that PW1 was also not in the position to give any money to the plaintiff that would enable the plaintiff to give the so called loans or RM1,935,500 to the deceased.

[34] From the above, we observed that the learned trial judge disbelieved the plaintiff and PW1 on their source of fund to give the loan sum to the deceased. Even though the loan amounted to almost RM2m, we must remember that it was not given in one go. The amount was given 68 times over a period of almost two years. The learned trial judge in his judgment required strict proof of the sum with supporting documents. Even though it was the defendant's pleaded case that the plaintiff did not have the financial means to let out the loan sum, we found that the learned trial judge had fallen into error when he failed to realise and consider that the evidence of PW1 and PW2 were not seriously challenged during the trial.

[35] Having gone through the appeal record carefully, we are of the considered view that the evidence of PW1 and PW2 were credible and supported the plaintiff's claim which was erroneously and unjustly brushed aside by the learned trial judge. PW1's and PW2's evidence pertaining to the plaintiff's capacity to give out the loan such as the plaintiff's landed properties, her savings in her various bank accounts, the millions of ringgit which she inherited from her late husband after he passed away and the amount of RM600,000 given by PW1 to the deceased all go to show that the learned trial judge had committed an appealable error which warrants appellate intervention on his findings of fact. We are mindful of the trite law that findings of fact and issues pertaining to the credibility of witnesses are within the scope of the trial judge, but when the finding is so perverse and against the weight of evidence as in the instant appeal before us, appellate intervention is warranted to prevent injustice.

[36] The plaintiff's case was further based on the two letters dated on 12 July 2010 and 15 July 2010 marked as P1A–B and P3. The integrity of the two letters was challenged by the defendant especially on the deceased's signature. the learned trial judge accepted the defendant's objection simply on the ground that the defendant being the wife of the deceased would be in a position to know her late husband's signature. The finding of the learned trial judge is erroneous in the absence of expert opinion by a handwriting expert. The learned trial judge misdirected himself when His Lordship held that the two letters were of no help to the plaintiff since the plaintiff did not have the capacity to give those loans.

[37] The letter dated 12 July 2010 (P1A) was addressed to the plaintiff and signed by the deceased. The letter contains a statement by the deceased that he had issued numerous cheques from his Maybank Account No 511122128928 as payment for his debts taken from the plaintiff. Together with that letter, a list of 68 cheques with the cheque numbers, dates and the amounts (P1B). P2 was another letter from the deceased dated 15 July 2010 listing a few properties as collateral for the money loaned. Both letters were witnessed and signed by PW1 and PW2. We were of the view that the two letters were relevant and lent support to the plaintiff's pleaded case. The learned trial judge erred when he disregarded them.

Cheques as collateral purpose

[38] Learned counsel for the plaintiff posited before us that the learned trial judge erred in law and/or in fact in finding that the 68 cheques issued by the deceased was for the purpose as stated on the reverse side of the cheques and not for the alleged 68 friendly loans that was required by the deceased. The learned trial judge found as follows at para 32 of his grounds:

[32] I am concern why the deceased had given 68 cheques with those writings at the reverse of the said cheques. There have to be some explanations why those writings were there, bearing in mind that those 68 cheques were intended to be security for the loans that were given by the plaintiff. I would have thought that those 68 cheques should not have any writings other than the sum of the loans given and the name of the plaintiff written there. I am equally concern why the plaintiff and especially her daughter who was very close to the deceased did not check these cheques and make sure they were issued without those writings. These 68 cheques are security for the RM1,935,500 this is a huge sum indeed. The point that I am making is that those cheques were the main security because the plaintiff's evidence was that, every time she gave loan to the deceased, he would issue a cheque and it is her evidence that PW1 was present when the deceased issued those cheques. Yet those cheques purportedly issued were not 'fresh' so to speak, but scribbled with writings that would show they were intended for payments to others. I am of the view that these writings: '5999', '6600', '3033', '3331 & 6819', '0899–100 & 0000–40', '7676–100 & 8000–25', '9999', '8088', 'WHP', 'BT 3338', 'K7S', '5200', '9832', '4412', 'Richard Will', '8883', '5575', 'palm', 'BAA 7293', '2000', '6662' and 'Brother Ming' do have meanings to the deceased and they can only be reference for which those respective cheques were intended for. It is my finding that on a balance of probabilities those 68 cheques with those writings were for payments as indicated at the back of the cheques but the same were not as collateral security for the alleged loans of RM1,935,500.

[39] We agreed with the plaintiff counsel's contention that the finding of the learned trial judge was speculative and erroneous, and not supported by any evidence during the trial. The plaintiff and PW1 in their testimonies told the court that they had no knowledge of the meaning or what was written on the back side of some of the cheques. Since those cheques were issued by the deceased and given to the plaintiff with the written notes already there, the deceased was the only person who knew what was the actual meaning. Since the deceased is already dead, there was no way to find out what those writings or notations meant. We agreed with the plaintiff's claim that those cheques were meant for collateral security for the loans to the deceased otherwise it would contradict the letter dated 12 July 2010 (P1A) written by the deceased.

[40] We observed that not all the 68 cheques had notations, symbols, numbers or writings on their reverse side as claimed by the defendant. We also observed that the defendant herself did not offer any explanation in her evidence as well as in her submissions. It is therefore hard for us to accept the defendant's denial that the 68 cheques were issued and given by the deceased to the plaintiff as collateral security for the loans taken.

The defendant in her pleading did not plead that the 68 cheques were not given as collateral security for the 68 loans taken by the deceased.

[41] We also observed the fact that some of the cheques were post-dated even after the deceased's death. This was never disputed by the parties in their evidence. The fact that the cheques were not banked goes to show that they were given as collaterals. The plaintiff's explanation was that these cheques were not banked in as she believed that the deceased would pay back the money by that date. We accept the explanation as reasonable. And on the issue raised by the defendant in her submission as to why no demand was made by the plaintiff during the deceased's lifetime, we dismissed this issue raised simply on the ground that the plaintiff was never cross-examined on the matter.

Purpose why the loans were given to the deceased

[42] The learned trial judge questioned why the loan was given and that the deceased did not require the loans for his businesses. This issue was discussed by the learned trial judge in his grounds under paras 25–28. At para 28, the learned trial judge said this:

> [28] There is no doubt that the deceased was gainfully employed before his passing. He was the sales manager of Sungly Motor and receiving salary. The evidence also showed that the deceased was involved in Mantap Niaga Sdn Bhd, Hoo Yee Kee Restaurant and Conqueror Disc Entrepreneur (sic). But then again the evidence showed that these entities were only established in 2010 just before the death of the deceased. I am however convicted that Sarawak KT Agency and Hand Enterprise having been established in 1998 and 2008 respectively would have incurred expenses since the kind of business they involved would require capital. I am however not prepared to accept that these two companies which are in the business of manpower and maid supply would require the deceased to borrow almost RM2,535,000 from PW1 and her mother. There is no evidence led by the plaintiff that the two companies would need substantial amount of capital hence the need for the deceased to borrow from the plaintiff and the PW1.

[43] We noted that during the trial, the plaintiff and PW1 were never asked the purpose of the borrowing by the deceased. Both witnesses told the court that they never asked the deceased the reason behind the borrowing but they were told by the deceased that he needed the money for running his business. There were six companies run by the deceased at the material time when the loan transacted. They were Sungly Motor, Mantap Niaga Sdn Bhd, Hoo Yee Kee Restaurant, Conqueror Disc Entrepreneur, KT Agency and Hand Enterprise. All these were within the knowledge of the defendant and mentioned by the learned trial judge in his judgment. Yet the learned trial judge brushed aside any possibility of the deceased requiring a big sum of money to run the six businesses. The learned trial judge put the burden on the plaintiff (the giver) to adduce evidence that the plaintiff needed substantial amount of capital to run his company's business when those facts were within the special knowledge of the defendant and the deceased. In fact, it is not the duty of the plaintiff to prove the purpose of the loan.

The plaintiff's late husband income not proven

[44] One of the reasons why the learned trial judge found that the plaintiff did not have the financial ability to give loans amounting to RM1,935,500 to the deceased was premised on the grounds that:

(a) she did not inherit a substantial amount of cash from her husband as her husband only earned a salary of RM10,000 per month with four children to support;

(b) after her husband retired in year 1997, her husband depended on his savings and odd jobs for living;

(c) after her husband passed away, she inherited two houses in Selangor and a bank account from her husband; and

(d) the plaintiff failed to produce the letters of administration of her late husband to prove her substantial inheritance.

[45] The learned trial judge finally decided that there was no evidence to support the plaintiff's capacity to lend RM1,935,500 to the deceased. This finding was attacked by the plaintiff on the ground that it was based on assumption and using a mathematical calculation of plaintiff's saving derived from a mere period of ten years of gainful employment. By doing that, learned trial judge ignored other material parts of plaintiff's evidence which was supported by the evidence of PW1. Regarding the letters of administration, the plaintiff explained that it was in the possession of plaintiff's eldest daughter who stayed in the Peninsular.

[46] We are of the view that the learned trial judge had failed to assess the totality of the evidence adduced at the trial correctly with regard to plaintiff's capacity to give out the loans to the deceased. The learned trial judge had committed an error in finding that the plaintiff's claim was statute-barred. We also found that the learned trial judge erred in disregarding the two crucial contemporary documents namely the letters dated 12 July 2010 and 15 July 2010 written by the deceased and the fact that the 68 cheques were given by the deceased to the plaintiff as collateral.

[47] In our judgment, the findings of the learned trial judge, with respect, cannot be sustained having regard to the evidence before him. The findings were, to our mind, flawed when tested against the documentary evidence submitted in court and was against the weight of evidence. The learned trial judge had misconstrued the plaintiff's evidence and had disregarded some of them. In our view, in the circumstances of the case warrants appellate intervention.

A **[48]** It was for all the reasons aforesaid that we allowed the plaintiff's appeal and set aside the decision of the High Court with costs of RM30,000 subject to payment of the allocator fee and the deposit was ordered to be refunded.

Appeal allowed; judgment of the High Court set aside with costs of RM30,000.

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Reported by Izzat Fauzan

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